UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

JESSE D. WEST,

Plaintiff,

9:17-CV-0621 v. (GTS/DJS)

JOHN HARKNESS, #0304, Police Officer; and JOHN HARRIMAN, #0463, Police Officer,

Defendants.

APPEARANCES:

JESSE D. WEST, 17-B-3123 Plaintiff, *Pro Se* Altona Correctional Facility 555 Devils Den Road Altona, New York 12910

HON. KRISTEN E. SMITH
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TODD M. LONG, ESQ. Assistant Corporation Counsel

OF COUNSEL:

GLENN T. SUDDABY, Chief United States District Judge

DECISION and ORDER

Currently before the Court, in this *pro se* prisoner civil rights action filed by Jesse D. West ("Plaintiff") against the two above-captioned police officers employed in the City of Syracuse ("Defendants"), are the following: (1) Defendants' motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c); (2) United States Magistrate Judge Daniel J. Stewart's Report-Recommendation recommending that Defendants' motion be denied, and (3) Plaintiff's affidavit regarding the Report-Recommendation. (Dkt. Nos. 19, 39, 40.)

After carefully reviewing the relevant papers herein, including Magistrate Judge Stewart's thorough Report-Recommendation, the Court can find no error in the Report-Recommendation, clear or otherwise: Magistrate Judge Stewart employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. (Dkt. No. 39.) As a result, the Report-Recommendation is accepted and adopted in its entirety for the reasons set forth therein. To those reasons, the Court adds the following analysis.

In his Amended Complaint, Plaintiff asserts three claims: (1) a claim of excessive force under the Fourth Amendment; (2) a claim of failure to protect under the Fourth Amendment; and (3) a claim of sexual assault under the Fourth Amendment. (Dkt. No. 8.) In his Report-Recommendation, Magistrate Judge Stewart recommends that Defendants' motion be denied with regard to all three claims, which should be permitted to proceed. (Dkt. No. 39.) Although Plaintiff's Objection to the Report-Recommendation was due on June 15, 2018, he did not file an Objection within that time period. Rather, in a submission entitled "Affidavit of Service" dated July 9, 2018 (and thus deemed "filed" on that date pursuant to the Prison Mailbox Rule), Plaintiff stated as follows:

[Although] U.S. Magistrate Judge Daniel J. Stewart . . . recommends that Defendants['] motion regarding Plaintiff['] claim for sexual assault be denied, and that Plaintiff's Fourth Amendment claim of sexual assault be permitted to proceed . . . [,] I'm not seeking to file charges against . . . [Defendants] for sexual assault and related charges

(Dkt. No. 40.)

Under the circumstances, the Court liberally construes this submission as either (1) a belated Objection to that portion of the Report-Recommendation recommending that Plaintiff's Fourth Amendment sexual assault claim be permitted to proceed (apparently because he mistakenly intended that claim to arise under New York common law, and now understands that

the claim cannot do so, and that any Fourth Amendment sexual assault claim would be redundant of his Fourth Amendment excessive force claim), or (2) a request to voluntarily discontinue his Fourth Amendment sexual assault claim pursuant to Fed. R. Civ. P. 41(a)(2) (for the same reason). Regardless of the construction, the result would be the same: the Court finds that cause has been shown for the dismissal of Plaintiff's Fourth Amendment sexual assault claim.

ACCORDINGLY, it is

ORDERED that Magistrate Judge Stewart's Report-Recommendation (Dkt. No. 39) is **ACCEPTED** and **ADOPTED** in its entirety; and it is further

ORDERED that Defendants' motion for judgment on the pleadings (Dkt. No. 19) is **DENIED**; and it is further

ORDERED that Plaintiff's Fourth Amendment sexual assault claim is **<u>DISMISSED</u>**; and it is further

ORDERED that **SURVIVING** this Decision and Order are Plaintiff's Fourth

Amendment excessive force claim and his Fourth Amendent failure-to-protect claim; and it is further

ORDERED that this case is referred back to Magistrate Judge Stewart for the resetting of pretrial scheduling deadlines.

Dated: August 7, 2018

Syracuse, New York

HON. GLENN T. SUDDABY

Chief United States District Judge